

FILED

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CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

UNITED STATES OF AMERICA,

CR. 11-30041

Plaintiff,

FINAL INSTRUCTIONS
TO JURY

-vs-

JERRY MATTHEW CHASING HAWK,

Defendant.

INSTRUCTION NO. 1

Members of the jury, the instructions I gave you at the beginning of the trial and during the trial remain in effect. I now give you some additional instructions.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because all are important.

The instructions I am about to give you now are in writing and will be available to you in the jury room. I emphasize, however, that this does not mean they are more important than my earlier instructions. Again, all instructions, whenever given and whether in writing or not, must be followed.

INSTRUCTION NO. 2

It is your duty to find from the evidence what the facts are. You will then apply the law, as I give it to you, to those facts. You must follow my instructions on the law, even if you thought the law was different or should be different.

Do not allow sympathy or prejudice to influence you. The law demands of you a just verdict, unaffected by anything except the evidence, your common sense, and the law as I give it to you.

INSTRUCTION NO. 3

I have mentioned the word "evidence." The "evidence" in this case consists of the testimony of witnesses, the documents and other things received as exhibits, and the facts that have been stipulated -- this is, formally agreed to by the parties.

You may use reason and common sense to draw deductions or conclusions from facts which have been established by the evidence in the case.

Certain things are not evidence. I shall list those things again for you now:

1. Statements, arguments, questions and comments by lawyers representing the parties in the case are not evidence.

2. Objections are not evidence. Lawyers have a right to object when they believe something is improper. You should not be influenced by the objection. If I sustained an objection to a question, you must ignore the question and must not try to guess what the answer might have been.

3. Testimony that I struck from the record, or told you to disregard, is not evidence and must not be considered.

4. Anything you saw or heard about this case outside the courtroom is not evidence.

INSTRUCTION NO. 4

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

In deciding what testimony to believe, consider the witness's intelligence, the opportunity the witness had to have seen or heard the things testified about, the witness's memory, any motives that witness may have for testifying a certain way, the manner of the witness while testifying, whether that witness said something different at an earlier time, the general reasonableness of the testimony, and the extent to which the testimony is consistent with any evidence that you believe.

In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider therefore whether a contradiction is an innocent misrecollection or lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.

INSTRUCTION NO. 5

You have heard testimony from persons described as experts. Persons who, by knowledge, skill, training, education or experience, have become an expert in some field may state their opinions on matters in that field and may also state the reasons for their opinion.

Expert testimony should be considered just like any other testimony. You may accept or reject it, and give it as much weight as you may think it deserves, considering the witness's education and experience, the soundness of the reasons given for the opinion, the acceptability of the methods used, and all the other evidence in the case.

INSTRUCTION NO. 6

The indictment in this case charges the defendant with committing the crime of Sexual Abuse. The defendant has pleaded not guilty to this charge.

As I told you at the beginning of the trial, an indictment is simply an accusation. It is not evidence of anything. To the contrary, the defendant is presumed to be innocent. Thus the defendant, even though charged, begins the trial with no evidence against him. The presumption of innocence alone is sufficient to find the defendant not guilty and can be overcome only if the Government proves, beyond a reasonable doubt, each element of the crime charged.

There is no burden upon a defendant to prove that he is innocent.

INSTRUCTION NO. 7

The crime of Sexual Abuse, as charged in the indictment, has five elements, which are:

One, that on or about the 8th day of August, 2009, Defendant engaged in a "sexual act" with Rheta Fischer;

The term "sexual act" as it is used in these instructions means contact between the penis and the anus. Contact involving the penis occurs upon penetration, however slight.

Two, that at the time of such act, Rheta Fischer was incapable of appraising the nature of the conduct or was physically incapable of declining participation in, or communicating her unwillingness to engage in, that sexual act;

Three, that Defendant committed such act "knowingly";

An act is done "knowingly" if the defendant realized what he was doing and did not act through ignorance, mistake, or accident. You may consider the evidence of the defendant's acts and words, along with all the evidence, in deciding whether the defendant acted knowingly.

Four, that Defendant is an Indian; and

Five, that the offense took place in Indian country.

If all of these elements have been proved beyond a reasonable doubt as to the defendant, then you must find the defendant guilty of the crime charged in the indictment; otherwise you must find the defendant not guilty of this crime.

INSTRUCTION NO. 8

The crime charged in the indictment includes an attempt to commit sexual abuse. The defendant may be found guilty of an attempt to engage in sexual abuse, if he both intended to engage in sexual abuse, and voluntarily and intentionally carried out some act which was a substantial step toward engaging in sexual abuse.

A substantial step must be something more than mere preparation, yet may be less than the last act necessary before the actual commission of the substantive crime. In order for behavior to be punishable as an attempt, it need not be incompatible with innocence, yet it must be necessary to the consummation of the crime and be of such a nature that a reasonable observer, viewing it in context, could conclude beyond a reasonable doubt that it was undertaken in accordance with a design to commit the crime alleged in the indictment.

For you to find the defendant guilty of an attempt to commit sexual abuse, there must exist in the mind of the defendant, Jerry Matthew Chasing Hawk, the specific intent to attempt the sexual act described in the indictment.

If the defendant acted without such specific intent, the attempt to commit such crime has not been committed.

INSTRUCTION NO. 9

If your verdict under Instruction No. 7 as to the crime charged in the indictment is not guilty, or if, after all reasonable efforts, you are unable to reach a verdict as to the crime charged in the indictment, you should record that decision on the verdict form and go on to consider whether the defendant is guilty of the crime of Abusive Sexual Contact under this instruction. The crime of Abusive Sexual Contact, a lesser included offense of the crime charged in the indictment, has four essential elements, which are:

One, that on or about the 8th day of August, 2009, in Fort Thompson, in the District of South Dakota, Defendant did engage in "sexual contact" with Rheta Fischer;

The term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks, of any person with an intent to abuse, humiliate, harass, degrade, arouse, or gratify the sexual desire of any person.

Two, that Defendant committed such act "knowingly;"

An act is done "knowingly" if the defendant realized what he was doing and did not act through ignorance, mistake, or accident. You may consider the evidence of the defendant's acts and words, along with all the evidence, in deciding whether the defendant acted knowingly.

Three, that Defendant is an Indian; and

Four, that the alleged offense took place in Indian country.

For you to find the defendant guilty of this crime, a lesser included offense, the Government must prove all of these essential elements beyond a reasonable doubt; otherwise you must find the defendant not guilty of this crime.

INSTRUCTION NO. 10

You have been instructed that in order to sustain its burden of proof on the charge of sexual abuse, the government must prove that the defendant knowingly engaged in a sexual act with Rheta Fischer who was incapable of appraising the nature of the conduct and was physically incapable of declining participation in and communicating unwillingness to engage in that sexual act.

In order to find the defendant guilty of Sexual Abuse you must find, beyond a reasonable doubt, that Rheta Fischer did not consent to the sexual act.

Likewise, in order to find the defendant guilty of the lesser included offense of Abusive Sexual Contact, you must find, beyond a reasonable doubt, that Rheta Fischer did not consent to the sexual contact.

INSTRUCTION NO. 11

Intent or knowledge may be proved like anything else. You may consider any statements made and acts done by the defendant, and all the facts and circumstances in evidence which may aid in a determination of the defendant's knowledge or intent.

You may, but are not required to, infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

INSTRUCTION NO. 12

A reasonable doubt is a doubt based upon reason and common sense, and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

INSTRUCTION NO. 13

You have heard evidence that the defendant allegedly engaged in sexual misconduct with Pauline High Bear. Defendant disputes this allegation. If you conclude that the defendant committed sexual abuse on another occasion, you may use this evidence in deciding whether the defendant is guilty beyond a reasonable doubt of the offense charged in the indictment. However, just because a person committed some other criminal act in the past does not prove or mean that the person committed another crime. If you conclude that the defendant did not commit sexual abuse on another occasion, then you must disregard the evidence.

The defendant is on trial only for the crime charged in the indictment. The testimony of prior misconduct does not mean that the defendant is guilty of the offense charged in the indictment.

INSTRUCTION NO. 14

Being under the influence of alcohol provides a legal excuse for the commission of a crime only if the effect of the alcohol makes it impossible for the defendant to have the specific intent to commit the act charged. Evidence that the defendant acted while under the influence of alcohol may be considered by you, together with all the other evidence, in determining whether or not he did in fact have such specific intent.

INSTRUCTION NO. 15

You have heard testimony about the character and reputation of Rheta Fischer. You may consider this evidence only in deciding whether to believe the testimony of Rheta Fischer and how much weight to give to it.

INSTRUCTION NO. 16

The indictment in this case alleges that the defendant is an Indian and that the alleged offense occurred in Indian country. The existence of those two factors is necessary in order for this Court to have jurisdiction over the crime charged in the indictment.

Counsel for the Government, counsel for the defendant, and the defendant have agreed or stipulated that the defendant is an Indian and that the place where the alleged incident is claimed to have occurred is in Indian country.

The defendant has not, by entering this agreement or stipulation, admitted his guilt of the offense charged, and you may not draw any inference of guilt from the stipulation. The only effect of this stipulation is to establish the facts that the defendant is an Indian and that the place where the alleged offense is claimed to have occurred is in Indian country.

INSTRUCTION NO. 17

In conducting your deliberations and returning your verdict, there are certain rules you must follow. I shall list those rules for you now.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to individual judgment, because a verdict - whether guilty or not guilty - must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict.

Third, if the defendant is found guilty, the sentence to be imposed is my responsibility. You may not consider punishment in any way in deciding whether the Government has proved its case beyond a reasonable doubt.

Fourth, if you need to communicate with me during your deliberations, you may send a note to me through the marshal or bailiff, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone - including me - how your votes stand numerically.

Fifth, during your deliberations, you must not communicate with or provide any information to anyone other than by note to me by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube or Twitter, to communicate to anyone information about this case or to conduct any research about this case until I accept your verdict.

Sixth, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. The verdict whether guilty or not guilty must be unanimous. Nothing I have said or done is intended to suggest what your verdict should be - that is entirely for you to decide.

The verdict form is simply the written notice of the decision that you reach in this case. You will take this form to the jury room, and when each of you has agreed on the verdict, your foreperson will fill in the form, sign and date it, and advise the marshal or bailiff that you are ready to return to the courtroom.